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Discussion

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Discussion after the Speech of George W. Coombe, Jr.

COMMENT, *Mr. Miller*: I would like to emphasize that mediation is a decision-making process in which the parties themselves are the decision-makers. Those of us who are trained to help others deal with conflicts must bear this in mind.

COMMENT, *Bruno Ristau*: I would like to follow-up on something said. Mr. Coombe mentioned the Iran/United States Claims Tribunal with which our distinguished Canadian colleagues may be unfamiliar.

The Tribunal was established in the Hague in 1981 in order to settle claims between the two countries and to alleviate a tense situation which might have led to a bloody conflict. Instead, a modicum of reason returned to both sides and they decided, "Let's not shoot, let's arbitrate."

The Tribunal is composed of three Americans, three Iranians and three neutrals. Its tribunal has been arbitrating claims between U.S. and Iranian citizens and intergovernmental claims since 1982. About 85% of the work of the Tribunal has been completed. In fact, the Tribunal will probably go out of business within the next year or so. I would like to add that this Tribunal was created through the work of lawyers, and Mr. Coombe is one of the lawyers who helped create that Tribunal.

COMMENT, *Mr. Coombe*: It is a unique success, and I think everybody will benefit from that success because the decisions made by the tribunal will be a model for the application of the UNCITRAL rules for years to come.

COMMENT, *Mr. Ristau*: The tribunal decisions are now recorded in eleven volumes by an English publisher. It is a body of international arbitral law which is absolutely unique.

COMMENT, *Mr. Shanker*: A talk concerning international arbitration, particularly between multi-national corporations who have ongoing long-term relationships, is all well and good, but I think we must also look to that vast group of international arrangements that are not at this time based on long-term relationships.

For example, we might benefit from a permanent division like the Iran/American division, where small businesses, without the benefit of all these draftings, could present their claims when disputes arise and receive quick adjudicatory service. Some people in small businesses do not even know how to negotiate a contract.

I would hope future conferences would attract speakers to address the credence of these concerns. A vast and important part of our economy needs professional help to prepare for the establishment of relationships.

The final thing I want to suggest is that we rethink the mediation mechanism which starts on the lowest level, progresses up to the CEO level, and if that does not work, to the adjudicatory level. Ed Teple, our colleague here, could probably verify that this is the process used in labor arbitration. First, the foreman tries to work it out, and if he is not successful, his superintendent tries to work it out. The next level is the union; and three, four, or five steps take place before the judicatory level of arbitration is reached. It would be better to get to the level that can make the settlement initially and to introduce a neutral if at all possible. The current process is far too time consuming. I would like to know if you have any comments about this.

COMMENT, *Mr. Coombe*: I agree with you completely. I have engaged in general orders in labor law quite extensively. Although the process is a little different when a union is a bargaining entity, it really is a two step process between the junior and senior executive.

The facilitator or neutral advisor is an added starter as well, and at some point, the parties may wish to rely on that neutral advisor's assistance to dispose of the dispute.

QUESTION, *Professor King*: For fifteen years you were Executive Vice President of Bank of America, and head of the general counsel; how successful was the implementation of ADR procedures there?

ANSWER, *Mr. Coombe*: It has worked beautifully. For one, I stayed current on all the dispute resolution procedures throughout the world with a library from the Center for Public Resources and membership in this organization. I shared these new ideas with the bank executives who are dealing in dispute resolution.

Secondly, I called Harvard Law School and they sent out a group to visit and teach my fellow banking colleagues negotiating skills.

Next, I had every member of the legal staff, 150 lawyers around the world, come back to our headquarters periodically. In groups of twenty or thirty, half bankers and half lawyers, we participated in negotiating sessions. It was great. The participants were completely immersed in the philosophy. The net result was that it was a very constructive and pervasive experience throughout the organization. It really pays off when it comes time to resolve a dispute.

Through mediation or mini-trial, I have resolved ten multi-million dollar disputes on behalf of the Bank of America over a five-year period. Each of the disputants, Firehouse, John Hancock, Morrison-Knudsen, Boise-Cascade, Arco, TransAmerica, and others like that, had signed the CPR corporate pledge. When a dispute arose with any of these corporations, before any pleading had been filed, I picked up the phone and said, "This is your old friend George, at the Bank of America. Do you recall the pledge you executed with your chief executive officer? I understand we have a dispute."

Now, none of those disputes presented legal exposure of less than

two or three million dollars, and one was as much as thirty. Each was quite complex, but none took more than two days to resolve with the assistance of a neutral, which in most cases was a mediator.

The net result was that I just refused to send anything more to juries. I drafted an arbitration clause for our middle-market lending contract and took all those cases away from the civil justice system. This worked out very, very well.

On the most important cases, the negotiation experience of our senior management resulted in my ability to pick up the phone and say, "Look, we have a shot at negotiating through this very serious matter with Morrison-Knudsen. I would like to talk to you about it because I think we have an exposure of about seven or eight million dollars." Well, there was no hostility on the part of the executive. There is an understanding. It is a serious business-related problem. Morrison-Knudsen is a good, long lived business relation for the Bank of America. The executive is thinking, "Boy, if I can settle this one successfully, it will be a feather in my money cap; and equally important, I can sustain that long lived relationship."

How many have read Fisher's GETTING TO YES? [many hands raised] This book details the type of negotiating experience that Bank of America shared with the Harvard group. It is available at your local book store, and will be one of the most interesting books you have read because you have lived that experience all your business lives whether you are a lawyer or a non-lawyer.

The one \$30 million exposure dispute derived from the so-called "big bang" on the stock market in 1987. Those who were engaged in investment advisory services and investment services such as banks, were subject to certain guidelines in the investment of employment benefit pension funds. All of those investment guidelines went awry in the wake of that precipitous drop. One did not know what to do. It was very technical; it was market oriented.

I met with a former SEC commissioner and attempted to understand exactly what had happened and whether we, in effect, were the cause of a loss for the pension fund of about \$30 million.

In talking over the dispute with my opposite member who would execute the pledge, we agreed that we would keep it in the Northwest and would get a mediator who we felt was a knowledgeable individual, and whom we felt could get the job done. We chose a gentleman who turned out to be former chair of the American Bar Association Tax Section.

Well, the long and short of it was we went to Seattle on a Thursday, and worked all day Friday and Saturday. On Saturday evening the mediator issued his decision. He pointed to me and said, "Seven and a half million dollars." My crowd looked a little blanched and then reluc-

tantly, after we paraded into another room, agreed to pay the seven and a half million dollars.

For the two days, the mediator's fee was \$12,000. Ten thousand dollars was paid for the expert opinion of the former SEC Commissioner, who I did not even put on the stand. So I leave you with that. There are tremendous economic gains to be had, but that is not the only important thing. The important thing is that the corporate endeavor goes on, the long lived relationship prospers, and everyone feels that this is a very efficacious way to address disputes.